No. 80-510

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In the Supreme Court of the United States

OCTOBER TERM, 1980

MOHINDER SINGH, ET AL.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in permitting the government to elicit from one of its witnesses on direct examination the fact that the witness had an outstanding unpaid civil judgment against petitioner Wadud for nonpayment of wages.

2. Whether the district court erred in declining to order production of materials relating to a federal investigation of a government witness and in limiting petitioners' cross-examination on that subject.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1980, and petitions for rehearing were denied on August 1, 1980 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed on September 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring, in violation of 18 U.S.C. 371, to induce illegal entry into the United States and to harbor illegal aliens in violation of 8 U.S.C. 1324, to make false statements to the Immigration and Naturalization Service (INS), the Department of State, and the Department of Labor in violation of 18 U.S.C. 1001 and 1015, to demand and receive fees unauthorized by law in proceedings relating to the registration of aliens in violation of 18 U.S.C. 1422, and to procure entry documents by fraud in violation of 18 U.S.C. 1546 (A. 10-15, 2016).[1] Petitioners were also convicted of various substantive offenses growing out of the conspiracy. Petitioner Wadud was convicted on four counts of aiding and abetting the making of false statements to the

[1] "A" refers to the joint appendix filed in the court of appeals.

INS or the Department of Labor, in violation of 18 U.S.C 1001, and one count of aiding and abetting the obtaining of an immigrant visa through fraud, in violation of 18 U.S.C. 1546; petitioner Bangladesh House was convicted on two Section 1001 counts; petitioner Bengal Cabaret was convicted on one Section 1001 and the Section 1546 count; and petitioner Mohinder Singh was convicted on the Section 1546 count (A. 15-18, 2016-2017). Petitioners Wadud and Bengal Cabaret were also convicted of a second Section 1546 aiding and abetting violation, but the count was dismissed because the defendant named as principal was acquitted (A. 17, 2016-2018).

Petitioner Wadud was sentenced to concurrent 15-month terms of imprisonment on the six counts upon which he was convicted (A. 2049). Petitioners Bengal Cabaret, Inc., and Bangladesh House, Inc. were fined $10,000 and $2,000 respectively (A. 19). Petitioner Mohinder Singh was given suspended sentences of one year's imprisonment on the two counts upon which he was convicted and was placed on probation for two years or until deported (A. 2051). The court of appeals affirmed (Pet. App. 1a-19a).

The evidence showed that petitioner Wadud, assisted by petitioner Mohinder Singh and others [2] and acting through the two corporate petitioners, operated a scheme to exploit illegal aliens from Bangladesh by employing them for long hours at virtually

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[2] The indictment also named Huq Rabiul Mani Sheikh in the conspiracy count and as a principal in one of the substantive counts, and Shyam Sunder, Jagtar Singh Sehgal and Sarbjit Singh as principals in other substantive counts (A. 16-18). Sheikh, Sunder, and Sehgal had not been apprehended at the time of trial; Sarbjit Singh was severed during trial, and subsequently a nolle prosequi was filed with respect to the charges against him.

no wages at the Nirvana Restaurant, which was owned and operated by a corporation, petitioner Bengal Cabaret. The scheme involved obtaining fraudulent entry documents and fraudulent permanent resident status for the aliens in exchange for both monetary fees and their agreement to work under substandard conditions.

ARGUMENT

1. Petitioners contend (Pet. 9-14) that the district court erred in permitting the government, on direct examination of its witness Nizamuddowlah, to elicit the fact that he had secured a civil judgment against petitioner Wadud for nonpayment of wages and that the judgment was as yet unpaid. This argument, which rests in part on record quotations characterized by significant omissions, is without merit.

a. One of the exploited aliens who testified as a government witness was Saleh Nizamuddowlah (also known as Miron). Nizamuddowlah had successfully sued Wadud in state court for nonpayment of wages but had not as yet collected on his judgment. At a pretrial hearing, Wadud's counsel stated that the civil litigation "is certainly relevant when it comes to credibility of witnesses and certainly going to be relevant in terms of cross-examination" (H. Tr. 28).[3] The court agreed that "the fact of their being on opposite sides of one another and involved in litigation may be relevant," but it added that "any *exhaustive* analysis or inquiry concerning the case is not" (*ibid.*; emphasis added). Petitioner Wadud's attorney agreed, but said he did not think "it can be totally

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[3] "H. Tr." refers to the transcript of the pretrial hearing held on September 18, 1979.

excluded" (*ibid.*). The court then indicated that there was no objection to "bring[ing] out on cross-examination that a particular witness had a basis for bias because he was suing somebody else" in another court, but that the prosecutor's concern was "that you might try to relitigate those issues here, and I can assure you that you are not going to be able to do that" (H. Tr. 28-29).

On direct examination of Nizamuddowlah at trial, the government brought out the fact of the civil suit and the unpaid judgment. The court, over Wadud's trial objection, allowed the testimony as relevant "to motive" (A. 337-338). In its final instructions, the court told the jurors that testimony concerning the civil suit had been admitted "solely on the issue of whether the witness Nizamuddowlah had another motive to testify in this action" and that they could "only consider the results of that case in this context, and that is in terms of assessing Nizamuddowlah's credibility" (A. 2000).[4]

b. Petitioner Wadud's attorney thus put the government on notice at the pretrial hearing that the civil case was likely to be used in cross-examination to attack witness credibility, and the court properly approved such a proposed line of questioning to show witness bias (see *Villaroman* v. *United States*, 184 F.2d 261, 262 (D.C. Cir. 1950)), limiting petitioner only as to any "exhaustive analysis or inquiry" into the litigation that would amount to "relitiga[tion]" of "those issues" (H. Tr. 28-29; compare Pet. 10).

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[4] Petitioners' quotation (Pet. 11) from the court's instruction omits the court's explanation that the evidence was admitted only for its relevance to Nizamuddowlah's motive for testifying.

It was therefore open to the government to attempt to defuse the argument by anticipating petitioners' cross-examination questions. *United States* v. *DiFrancesco*, 604 F.2d 769, 775 (2d Cir. 1979), cert. granted on another issue, No. 79-567 (Feb. 19, 1980) (argued Oct. 6, 1980), decision pending; see also *United States* v. *Partin*, 552 F.2d 621, 644-645 (5th Cir.), cert. denied, 434 U.S. 903 (1977). Since the fact that petitioner Wadud had not paid the judgment might be seen as contributing to the witness's bias, it was not, as petitioners suggest (Pet. 11-14), error for the court to allow the government to elicit the fact that there was an outstanding unpaid judgment as well as the fact that the suit had been brought.

United States v. *Konovsky*, 202 F.2d 721 (7th Cir. 1953), on which petitioners rely (Pet. 9, 12-13), is not to the contrary. That case involved the introduction of a civil injunction prohibiting one of the defendants from committing the precise act (acting in concert with others to prevent a black citizen from entering his property) that was the essence of the criminal offense with which he was charged. At the government's request, the court instructed the jury to consider the injunctive order "not as proof" of the criminal violation charged but "as a circumstance in the light of which the conduct of the defendants should be 'evaluated'." 202 F.2d at 726. In the present case, by contrast, the unpaid judgment for nonpayment of wages concerned a fact relevant to the offense charged but did not evidence conduct equivalent to the offense itself; the court's instruction strictly limited jury consideration of the testimony to its relevance to the witness's possible bias; and the testimony was invited by the defense suggestion that the evidence would be brought out on cross-examination.

2. Petitioners also contend (Pet. 14-21) that the district court erroneously condoned government suppression of materials relating to a federal investigation of government witness Franklin S. Abrams for falsification of labor certifications not involved in this case and that it erroneously curtailed petitioners' cross-examination of Abrams on this subject. Both claims are groundless.

a. Franklin S. Abrams is an immigration attorney who represented several of the aliens in obtaining labor certifications. He testified that he had obtained the information (elsewhere shown to be false) used in applying for the certifications from petitioners Wadud and Mohinder Singh (A. 943-960, 964-966). Prior to Abrams' appearance as a witness, the government informed the court ex parte in chambers that Abrams had been the subject of an unrelated labor certification fraud investigation as to which prosecution was declined; the investigative files pertaining to that case were turned over to the court for an in camera determination concerning whether production to petitioners was required (A. 400-401). Subsequently, in the presence of defense counsel, the government reiterated its request for a determination whether the material was producible to petitioners under either 18 U.S.C. 3500 or *Brady* v. *Maryland*, 373 U.S. 83 (1963) (A. 841-844).

After reviewing the materials overnight, the court ruled that production was not required on either basis (A. 852). The court also initially refused to permit Wadud's counsel to question Abrams on cross-examination about the investigation (A. 969). Thereafter it reversed itself and permitted counsel to inquire whether Abrams was the subject of an investigation by Immigration authorities or an inquiry by

the United States Attorney's office (A. 971-972). Counsel was forbidden to go into details but was allowed to inquire "whether pressure or threats of any kind were involved" (A. 972-973). Counsel, however, inquired only whether Abrams was the subject of an investigation and not whether the investigation involved pressure or threats (A. 973).

b. Contrary to petitioners' repeated assertions (Pet. 15, 19, 20), the government did not "deliberately suppress" the information pertaining to the investigation of Abrams. Rather, the government followed the procedure recommended in *United States* v. *Agurs*, 427 U.S. 97, 106 (1976), of turning the material over to the court for its determination whether production to the defense was required. Both that court and the court of appeals—which "carefully examined the files" (see Pet. App. 14a)—concluded that production was not required. There is no occasion for this court to afford further review of this question.

c. The court of appeals was also correct in upholding the trial court's refusal "to allow examination to extend into the details of collateral matters not connected with the present case" (Pet. App. 14a). Credibility may be attacked only on the basis of a prior conviction, not a mere investigation. See Rule 609, Fed. R. Evid. The only relevance of the unrelated investigation of Abrams, therefore, was that it might have been used to pressure him into giving the testimony that he gave. The trial court extended to petitioners an opportunity to inquire about this, but petitioners declined to avail themselves of the opportunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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